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In The

# Supreme Court of the United States

ALBERTO R. GONZALES, U.S. Attorney General,

*Petitioner,*

vs.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ET AL.,

*Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

## AMICUS CURIAE BRIEF OF RIGHT TO LIFE ADVOCATES, INC. IN SUPPORT OF THE PETITIONER

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## INTEREST OF THE AMICUS CURIAE

Right To Life Advocates, Inc., Amicus Curiae herein ("Life Advocates"), is a nonprofit corporation organized in 1974 under the laws of the State of Texas and has a tax exempt status under §501(c)(4) of the Internal Revenue Code. It is a pro-life advocacy organization interested in the preservation of the sanctity of human life from its commencement until natural death.[1]

All parties to this cause have consented to the filing of this Brief. Documents expressing such consent are being submitted for filing herewith.

## SUMMARY OF THE ARGUMENT

The Court of Appeals held the Partial-Birth Abortion Ban Act of 2003, 117 U.S. Stat. 1206-1207, Sec. 3 ("The Act"), facially unconstitutional for three reasons, namely, that it lacked an exception for preservation of maternal health, that it posed an undue burden on women seeking previability abortions and that it was impermissibly vague. These holdings lack merit.

A. The first two reasons stemmed from the abortion liberty fashioned by *Roe v. Wade*, 410 U.S. 113 (1973), amplified in part by *Doe v. Bolton*, 410 U.S. 179 (1973), and repudiated in part and reaffirmed in part by *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 883

[1] This Brief was not authored in whole or in part by any counsel for a party in this cause, and no outside person or entity made any monetary contribution toward the preparation or submission of this Brief. See this Court's Rule 37.6.

(1992). The Court of Appeals erred in holding The Act facially unconstitutional for such reasons since *Roe* and *Doe* are void as violative of the Constitution and, hence, have no legal efficacy. Those decisions and their progeny should be overruled as decided wrongly.

1. The unconstitutionality of *Roe* and *Doe* is stark and pervasive. See pp. 10-24 of the AMICUS CURIAE BRIEF OF RIGHT TO LIFE ADVOCATES, INC. filed in *Gonzales v. Carhart,* No. 05-380 (*cert. granted* on February 21, 2006), incorporated herein by this reference.

*Roe* and *Doe* have produced consequences not intended by this Court, namely, (a) resultant abortion on demand, (b) resultant harmful effect on Children who "survive" abortion and (c) resultant internal legal chaos relative to the legal recognition and rights postures of unborn children.

3. Finally, *Roe's* erroneous refusal to resolve the question of when human life commences by resort to biology – the only relevant discipline in such regard – masked the reality of abortion as a destroyer of human life, made it easier to focus on the situation of the pregnant woman and to fashion an abortion liberty from a Constitution silent on the subject and, together with *Doe's* broad definition of maternal health, led to abortion on demand in this Nation. If the Court could not resolve that question in 1973, it surely can now. Human life commences at fertilization when an ovum is fertilized by a sperm cell. *Harvard Medical School Family Health Guide* (2005), p. 903.

B. If *Roe* and *Doe* are valid decisions, the Court of Appeals erred in holding The Act facially unconstitutional for want of a maternal health exception and because it

constituted an undue burden to a pregnant woman seeking a post first trimester abortion.

1. *Roe's* maternal health exception was not applicable to The Act. In this regard, the *Roe* Court pointed out that "the Texas statutes *that concern us here* are Arts. 1191-1194 and 1196 of the State's Penal Code. These make it a crime to 'procure an abortion,' *as therein defined,* except with respect to 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother' " (410 U.S. at 117-118 and n. 1). Article 1195 of the former Penal Code of Texas – which made it a crime, during parturition of the mother, to destroy the vitality or life of an Unborn Child "in the state of being born and before actual birth, which child would otherwise have been born alive * * * " – was "not attacked" (*id.* at 118 and n. 1 at 118). In short, *Roe* was concerned with abortion *in utero.* It does not apply to the procedure prohibited by The Act.

In any event, such an exception was obviated by a Congressional Finding that partial-birth abortion "is never medically indicated to preserve the health of the mother" [117 U.S. Stat. 1206, Sec. 2(14)(O)]. The Court of Appeals was required to defer to and accept this and Congress's related consensus Finding if they were reasonably inferred by Congress from substantial evidence before it. *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180, 195-196 (1997).

The Court of Appeals, however, said that the "dispositive question" was not the Finding that the prohibited procedures were never necessary, etc., but that, under *Stenberg v. Carhart,* 530 U.S. 914 (2000), "whether there is general agreement in the medical community that there are no circumstances in which the procedure would be necessary

to preserve a woman's health" (435 F.3d at 1175). It challenged Congress's consensus Finding [117 U.S. Stat. 1201, Sec. 2(1)]; and said that "a substantial disagreement exists in the medical community regarding whether those procedures are necessary in certain circumstances for that purpose", and that "[i]n such circumstance", it was "compelled to hold that a health exception is constitutionally required" (435 F.3d at 1174-1175, 1175-1176).

Congress's consensus Finding was derived from three components – moral, ethical and medical – and it was the job of Congress, as fact finder, to sort out differing opinions or presentations on the subject and come to a consensus conclusion which it did. In so doing, it was not required to give operative weight or credibility to claims that partial-birth abortion was necessary for maternal health preservation "in certain circumstances" when either no such "circumstances" were presented or no showing was made that maternal health could have been preserved by an alternative (and safer) means. Hence, that Finding did not undermine Congress's conclusionary Finding, above, which obviated the need for a maternal health exception, and the Court of Appeals erred when it refused to apply the *Turner* standard and defer to and accept each such Finding.

2. The Court of Appeals erred when it determined that The Act constituted an undue burden to a pregnant woman seeking a previability abortion since "properly construed the Act covers non-intact as well as intact D & Es", etc. (435 F.3d at 1179). The Act, however, requires that the affected physician have a certain specific intent, certain knowledge concerning the overt act which kills the Unborn Child and the introduction of lethal force to such Child at a designated anatomical point(s) *outside* the mother's body. The non-intact D & E procedure, which

contemplates dismemberment and death in the uterus through a dilated cervix, does *not* contain these elements or requirements. A physician performing a non-intact D & E would not run afoul of The Act if he were to remove from the mother's body an Unborn Child's skull for piercing, etc. because the introduction of lethal force or means occurred *inside* the woman's body and the Unborn Child would be dead or dying due to dismemberment at the time of such partial removal. In short, The Act requires the coexistence of certain *scienter* and conduct not included in the D & E procedure.

C. Finally, The Act is not impermissibly vague, and the Court of Appeals erred when it held to the contrary. A fair reading of the definition of partial-birth abortion in The Act shows clearly that it does not cover the *non-intact* D & E procedure. Accordingly, it gives fair notice to a person of ordinary intelligence of what is proscribed and is sufficiently explicit to prevent arbitrary or discriminatory law enforcement of it. See *Kolender v. Lawson,* 461 U.S. 352, 357 (1983); *Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972).

In this regard, (1) in the D & E procedure the lethal force or means is introduced *into the mother's uterus* through a dilated cervix *whereas* in The Act the lethal force or means is introduced when the Unborn Child has been delivered vaginally to a designated anatomical point(s) *outside the mother's body;* (2) in the D & E procedure the physician's intent is to dismember (and kill) the Unborn Child *in utero whereas* in The Act the physician's intent is to deliver the Unborn Child vaginally to a designated anatomical point(s) outside the mother's body for the purpose of killing such Child at such point(s); and (3) in the D & E procedure the Unborn Child either is killed

*in utero* or is in the process of dying when pulled outside the mother's body *whereas* in The Act the Unborn Child is alive when partially delivered and killed at a designated anatomical point(s) outside the mother's body by an overt act other than completion of delivery which the physician knows will kill such Child. In short, the *scienter,* conduct and place of killing are altogether different between The Act and the D & E procedure.

## ARGUMENT

### I.

### THE HOLDINGS BY THE COURT OF APPEALS THAT THE ACT WAS FACIALLY UNCONSTITUTIONAL BASED ON REASONS STEMMING FROM THE ABORTION LIBERTY ARE ERRONEOUS SINCE *ROE V. WADE* AND *DOE V. BOLTON* WHICH UNDERLIE SUCH HOLDINGS WERE DECIDED WRONGLY AND SHOULD BE OVERRULED

**A. Introduction.** The Court of Appeals held that the Act was facially unconstitutional for three reasons, the first two of which are addressed in this Section and in Section II, *infra*. The first reason was that The Act did not include an exception for preservation of maternal health per *Roe v. Wade, supra,* 410 U.S. 113, and *Stenberg v. Carhart, supra,* 530 U.S. 914.

The second reason was that it posed an "undue burden" on a pregnant woman's right to choose a previability abortion because "properly construed The Act covers non-intact as well as intact D&Es" (435 F.3d at 1179). See *Casey, supra,* 505 U.S. at 878, 879. It said that the Act is "sufficiently broad to cause those who perform non-intact D&E procedures to 'fear prosecution, conviction, and imprisonment'

[citing *Stenberg*]", with a resultant "chilling effect on doctors' willingness to perform previability post-first trimester abortions * * * " (435 F.3d at 1179).

Since the Court's holdings involve the application and/or interpretation of (1) *Roe's* health exception, as amplified in *Doe* and applied in *Stenberg,* and as reaffirmed in *Casey,* and (2) *Casey's* reaffirmation of *Roe's* central holding, Life Advocates submits the Court should take the opportunity which this case presents to reconsider the constitutional and other aspects of *Roe* and *Doe* to determine whether they were decided wrongly and, if so, to overrule them and their progeny accordingly. For the reasons and authorities presented herein, Life Advocates submits that *Roe* and *Doe* should be reconsidered and overruled as decided wrongly, and that their progeny, including *Casey* and *Stenberg,* should be overruled in like manner.

**B. *Roe* and *Doe* Should Be Overruled.** At the threshold, the Court of Appeals was not required to consider whether The Act should include *Roe's* maternal health exception, as amplified by *Doe,* or whether The Act constituted an "undue burden" to women seeking previability abortions, because *Roe* and *Doe* are void as violative of the U.S. Constitution and, hence, have no legal efficacy. They and all decisions of this Court applying those decisions should be overruled as decided wrongly. The reasons in support of this position are described below:

**1. Unconstitutionality.** The unconstitutionality of *Roe* and *Doe* is stark and pervasive. See pp. 10-24 of the AMICUS CURIAE BRIEF OF RIGHT TO LIFE ADVOCATES, INC. in *Gonzales v. Carhart,* No. 05-380 (*cert. granted* on February 21, 2006), incorporated by reference

herein. This Court, like any other court in this Nation, is capable of violating the Constitution in a case before it and has done so. See *Swift v. Tyson,* 16 Pet. 1, 18-20 (1842), overruled in *Erie R. v. Tompkins,* 304 U.S. 64 (1938); *Plessy v. Ferguson,* 167 U.S. 537 (1896), repudiated in *Brown v. Board of Education of Topeka, Kansas,* 347 U.S. 483 (1954). Thus, in *Erie,* this Court, speaking through Justice Brandeis, stated, in part (pp. 77-78, 78, 79-80):

> * * * If only a question of statutory construction was involved, we should not be prepared to abandon a doctrine [declared in *Swift v. Tyson*] so widely applied throughout nearly a century. But the *unconstitutionality* of the course pursued has now been made clear and compels us to do so.
>
> * * *
>
> * * * There is no general federal common law. Congress has no power to declare substantive rules of common law applicable to a State whether they be local in nature or "general," be they commercial law or part of the law of torts. *And no clause in the Constitution Purports to confer such a power upon the federal courts.* * * *
>
> * * *
>
> * * * In disapproving that doctrine we do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that *in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.* (Emphasis added.) (Footnote omitted.)

**2. Unintended Consequences.** *Roe* and *Doe* have produced consequences not intended by this Court. Thus:

**a. Abortion on Demand.** In *Roe,* this Court disagreed with the argument of appellant and some *amici* "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time in whatever way, and for whatever reason she alone chooses" (410 U.S. at 153). "Plainly, the Court today rejects any claim that the Constitution requries abortion on demand" (410 U.S. at 208, Burger, C.J., concurring in *Roe* and *Doe*). In *Doe,* this Court said that "*Roe v. Wade, supra,* sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand" (410 U.S. at 189).[2]

Common knowledge shows that just the opposite has occurred and continues to this day, to which this Court is requested to take judicial notice. Millions of Unborn Children have been killed by abortion on demand in this Nation, and millions more will suffer the same fate so long as *Roe* and *Doe* and what they have wrought persists. Even where a State proscribes abortion after viability, the health exception required by *Roe* and amplified in *Doe* is so broad that such a prohibition is more form than substance.

**b. Harmful Effect on Children Who "Survive" Abortion.** The abortion liberty and its "ethic" have resulted in the deaths of Children who "survive" abortion. These Children, who, with minor exceptions, are U.S. Citizens, die primarily from prematurity, abortional injury or lack of care. See 126 "Am. J. Obstet. Gynecol." (Sept. 11, 1976), pp. 83-89. Sometimes they are murdered outright.

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[2] *Roe's* reach into post-viability abortions was not readily apparent since the Court defined maternal health (for exception purposes to regulation or proscription after viability) very broadly *elsewhere* – in *Doe. Roe* and *Doe* are to be read together (*Roe*, 410 U.S. at 165).

See *Showery v. State,* 690 S.W.2d 689 (Tex. App. – El Paso 1985, pet. ref.), where a Girl brought forth alive after a hysterotomy abortion with estimated weight of 3, 5 and 5-6 pounds was killed after the physician pressed the placenta over her face and immersed her in a bucket of water. This Court in *Roe* and *Doe* did not even consider the plight of such Children, let alone mandate or even counsel for their protection after births in environments hostile to their continued lives.

Moreover, since "unsuccessful" abortions – those resulting in live births – could translate into legal claims against the physicians, etc., "success" is encouraged to the naked detriment of infant U.S. Citizens. See *The Ladies Center of Clearwater Inc. v. Reno,* 341 S.2d 543, 544 (Fl. App., 2d Dist., 1977); *Stills v. Gratton,* 127 Cal. Rptr. 652, 653-656 (Cal. App., 1st Dist., 1976).

**c. Internal Legal Chaos.** *Roe* has introduced legal chaos into U.S. States and Territories relative to the position of Unborn Children. As shown on pp. 13-15 of Life Advocates' Amicus Curiae Brief, above, incorporated herein by this reference, unborn Children have recognized legal statuses and rights postures – vested and contingent – in civil law, including U.S. statutory law, yet they may be destroyed along with all such rights by exercise of the abortion liberty. This is an affront to logic, not to mention justice, and makes the efficacy of legal rights in such context depend not on their merits but on the desires and actions of others – a stark contradiction to the rule of law. Where interests and rights conflict, it is reasonable that the judiciary should act to harmonize and adjust them, not allow those of one side of the equation to trump those on the other with a tool of total destruction.

**3. Deleterious Effect of the Court's Erroneous Refusal To Resolve the Question of When Human Life Begins.** The *Roe* Court said that it "need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, *at this point in the development of man's knowledge,* is not in a position to speculate as to the answer", 410 U.S. at 159. (Emphasis added.) This was error since the very issue before the Court involved the question whether the Constitution authorized the destruction of that life by abortion.

The effect of the Court's refusal to resolve that question was impermissibly awkward and harmful to the Court's interpretative approach to the Constitution since it made it easier to focus on the pregnant woman and fashion and present for acceptance a new constitutional right of abortion on demand. After all, there was no determination by the Court that a pregnant woman carried human life within her. This deficiency, coupled with the Court's calling what she carried within her "potential life" or the "potentiality of life," operated to downplay the killing effect by her exercise of the abortion liberty. Had that question been resolved by the only relevant discipline – human biology – it would have been difficult at best to fashion such a liberty from a Constitution silent on the subject and in the face of substantial legal and protective tradition for Unborn Children in this Nation.

Resolution of the question of when human life begins would not have been difficult. It was common knowledge supported by biological facts at that time that human life commenced at conception (fertilization). Unborn Children are live human beings from fertilization forward. See Life

Advocates' Amicus Curiae Brief, *supra*, p. 19, incorporated herein by this reference.

Finally, if the Court could not resolve that question in 1973, it surely can now. See *Harvard Medical School Family Health Guide* (2005) which states, in part, that "[e]ach person begins life as a single cell, after an egg cell from a woman has been fertilized by a sperm cell from a man" (p. 903). See Kenner and Wright, *Comprehensive Neonatal Nursing* (2003), which states, in part, that "[t]he process of human development begins with the fertilization of an ovum (female gamete) by a spermatocyte (male gamete)" (p. 151).

## II.

## IF *ROE V. WADE* AND *DOE V. BOLTON* ARE VALID DECISIONS, THE HOLDINGS BY THE COURT OF APPEALS THAT THE ACT WAS FACIALLY UNCONSTITUTIONAL BASED ON REASONS STEMMING FROM THE ABORTION LIBERTY ARE ERRONEOUS SINCE (1) *ROE* DOES NOT APPLY TO THE PROCEDURE PROHIBITED BY THE ACT, (2) IF *ROE* DOES APPLY, ITS MATERNAL HEALTH EXCEPTION WAS NOT REQUIRED FOR INCLUSION IN THE ACT AND (3) THE ACT DOES NOT VIOLATE THE UNDUE BURDEN STANDARD OF *CASEY*

**A. Background. 1. The Maternal Health Exception.** In *Roe*, this Court held that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" (410 U.S. at 164-165). In *Doe*, this

Court agreed with the District Court "that the medical judgment [of the attending physician] may be exercised in light of *all factors – physical, emotional, psychological, familial and the woman's age-relevant to the well being of the patient.* All of these factors may relate to health" (410 U.S. at 192). (Emphasis added.) *Roe* and *Doe* are to be read together (*Roe,* 410 U.S. at 165).

In *Casey, supra,* 505 U.S. 833, this Court, *inter alia,* rejected the "rigid trimester framework of *Roe*"; fashioned an "undue burden" analysis in order to protect the central right "recognized" in *Roe* and to accommodate the State's "profound interest in potential life"; and reaffirmed the central holding of *Roe* and its post-viability abortion holding, above (*id.* at 878, 879). In describing such analysis, the Court said that "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" (p. 878).

**2. This Court's Decision in *Stenberg v. Carhart.*** In *Stenberg v. Carhart, supra,* 530 U.S. 914, this Court held unconstitutional Nebraska's statutory ban on partial birth abortions ("D&X" procedures) because it lacked an exception for preservation of maternal health – an exception which stems from *Roe* and is amplified definitionally in *Doe* – and, because of such deficiency, placed an undue burden on the ability of women to choose abortion. The Court pointed out that the District Court found that "D&X significantly obviates health risks in certain circumstances" (p. 936), and held that "a statute that altogether forbids D&X creates a significant health risk" (p. 938).

**3. The Act.** Section 3 of The Act amends Title 18 of the United States Code by making it a crime for "[a]ny physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus * * * ." 117 U.S. Stat. 1206, Sec. 3. This "does not apply to a partial-birth abortion that is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." *Ibid.* The Act does not include an exception for preservation of maternal health.

The Act defines partial-birth abortion to mean an abortion where the person performing it (*id.* at 1206-1207, Sec. 3)

> (A) *deliberately and intentionally* vaginally delivers a living fetus *until*, in the case of a head-first presentation, the entire fetal head is *outside* the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is *outside* the body of the mother, *for the purpose of performing an overt act* that the person *knows* will kill the partially delivered living fetus; and
>
> (B) performs the overt act, *other than completion of delivery*, that kills the partially delivered living fetus. (Emphasis added.)

**4. Certain Relevant Congressional Findings.** In Sec. 2 of The Act, "FINDINGS", Congress made a number of findings and declarations, including the following (117 U.S. Stat. 1201, 1204, 1206, Sec. 2):

> (1) *A moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion * * * is a gruesome and inhumane*

*procedure that is never medically necessary and should be prohibited.*

* * *

(14) Pursuant to testimony received during extensive legislative hearings during the 104th, 105th, 107th, and 108th Congresses, Congress finds and declares that:

* * *

(C) A prominent medical association has concluded that partial-birth abortion is "not an accepted medical practice", that it has "never been subject to even a minimal amount of the normal medical practice development," that "the relative advantages and disadvantages of the procedure in specific circumstances remain unknown," and that "there is no consensus among obstetricians about its use". The association has further noted that partial-birth abortion is broadly disfavored by both medical experts and the public, is "ethically wrong," and "is never the only appropriate procedure".

* * *

(O) For these reasons, Congress finds that partial-birth abortion *is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; poses additional health risks to the mother; blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth; and confuses the role of the physician in childbirth and should, therefore, be banned.* (Emphasis added.)

**B. *Roe* and *Doe* Do Not Apply to the Procedure Prohibited by The Act.** The abortion liberty fashioned

by *Roe* and amplified in part in *Doe* does not apply to the process of childbirth, whether occurring naturally or by way of induction. In this regard, the *Roe* Court pointed out that "[t]he Texas statutes *that concern us here* are Arts. 1191-1194 and 1196 of the State's Penal Code. These make it a crime to " 'procure an abortion,' *as therein defined,* except with respect to 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.' " (*id.* at 117-118 and n. 1). (Emphasis added.) Article 1191 defined "abortion" to mean "that the *life* of the fetus or embryo *shall be destroyed in the woman's womb* or that a *premature birth thereof be caused.*" *Ibid.* (Emphasis added.)

The Court said that Article 1195 was "not attacked", and quoted it as follows (*id.* at 118 and n. 1 at 118):

> "Art. 1195. Destroying unborn child
>
> "Whoever shall *during parturition of the mother* shall destroy the vitality or life in a child *in the state of being born and before actual birth, which child would otherwise have been born alive,* shall be confined in the penitentiary for life or for not less than five years." (Emphasis added.)

Article 1195 is now Art. 4512.5, *Vernon's Tex. Civ. Stats. Ann.*

Thus, the Court was *not concerned* with the Texas prohibition against destruction of the life of an Unborn Child "in the state of being born and before actual birth" under Article 1195, above. *Nor* is there anything in *Roe* to show any reach of the abortion liberty to a partial-birth procedure like that described in The Act. See Congress' related finding at 117 U.S. Stat. 1205, Sec. 2(14)(H).

Hence, *Roe's* maternal health exception for abortions after viability, as amplified in *Doe,* simply does not apply to The Act – where (1) the physician intends to and does deliver vaginally an Unborn Child to a particular anatomical point(s) outside the mother's body for the purpose of killing such Child at such point(s), and (2) the physician kills such Child by an overt act (other than the completion of delivery) which the physician knows will kill such Child.

In short, *Roe* applies to abortion *in utero* – where the lethal chemicals, drugs and/or surgical instruments are introduced *into* the uterus of a pregnant woman for the purpose or killing or commencing the killing of her Unborn Child then and there. The Act, on the other hand, seeks to prohibit the introduction of a killing force by overt act other than completion of delivery *after* the Child is partially delivered to a specified anatomical point(s) *outside* the mother's body. Since *Roe* does not apply to the partial-birth procedure prohibited by The Act, the Court of Appeals erred in holding The Act facially unconstitutional for want of *Roe's* maternal health exception.

**C. *Roe's* Maternal Health Exception Was Not Required for Inclusion in The Act.** Finally, if *Roe* and *Doe* are valid decisions, Congressional Findings underlying enactment of The Act *obviated* any need for inclusion therein of a maternal health exception. As shown above, Congress found, in part, (1) that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion * * * is a gruesome and inhumane procedure that is never medically necessary and should be prohibited", and (2) that "partial-birth abortion is never medically indicated to preserve the health of the mother" [117 U.S. Stat. 1201, 1206, Sec. 2(1) and (14)(O)]. So long

as these Findings were inferred reasonably from substantial evidence before Congress they were binding on the Court of Appeals. *Turner Broadcasting System, Inc. v. FCC, supra*, 520 U.S. at 195-196.

The Court of Appeals, however, said that the "dispositive question" was not the Finding that the prohibited procedures were never necessary, etc., but that, under *Stenberg*, "whether there is general agreement in the medical community that there are no circumstances in which the procedure would be necessary to preserve a woman's health" (435 F.3d at 1175). It challenged Congress's consensus Finding [117 U.S. Stat. 1201, Sec. 2(1)]; and said that "a substantial disagreement exists, in the medical community regarding whether those procedures are necessary in certain circumstances for that purpose" and, "[i]n such circumstance" it was "compelled to hold that a health exception is constitutionally required" (435 F.3d at 1174-1175, 1175-1176). This was error.

As shown above, the consensus which Congress found was a "moral, medical, and ethical" one. From a moral and ethical standpoint it is almost axiomatic that such a consensus would exist without more.

From a medical standpoint, the fact that there was disagreement as to the necessity of the procedure in some – unspecified – circumstances for preservation of maternal health does not undermine such consensus Finding. The Finding was derived from three components – moral, ethical and medical – and it was the job of Congress, as fact-finder, to sort out differing opinions or presentations on the subject and come to a consensus conclusion which it did. In so doing, it was *not* required to give operative weight or credibility to claims that partial-birth abortion was necessary for health preservation "in some circumstances"

*when* either no such "circumstances" were presented *or* no showing was made that maternal health could have been preserved by alternate (and safer) means.[3] Accordingly, the consensus Finding did not subvert or impugn Congress' conclusionary Finding obviating the need for such exception – that "partial-birth abortion is never medically indicated to preserve the health of the mother * * * " [117 U.S. Stat. 1206, Sec. 2(14)(O)] – and the Court of Appeals erred when it refused to defer to and accept each such Finding by application of the *Turner* standard.

The thrust of the approach taken by the Court of Appeals appears to be that such a "consensus" could not exist where there were divergent medical opinions on the issue of need for such health exception. Such an approach not only denigrates Congress' investigative role as a fact-finder herein, including credibility determinations, but extends trump value to opposing advocates with opinions lacking in substantiation or completeness.

**D. The Act Does Not Constitute an Undue Burden to a Pregnant Woman Seeking a Previability Abortion.** The Court of Appeals also held The Act facially unconstitutional because it presented an "undue burden" to a pregnant woman seeking a previability abortion since "properly construed the Act covers non-intact as well as intact D & Es. As a result, * * * the Act is sufficiently broad to cause those who perform non-intact D & E procedures to 'fear prosecution, conviction, and imprisonment' [citing *Stenberg*]. The resulting chilling effect on doctors'

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[3] Congress found that "[p]artial-birth abortion poses serious risks to the health of a woman undergoing the procedure", and specified a number of such risks [117 U.S. Stat. 1204, Sec. 2(14)(A)].

willingness to perform previability post-first trimester abortions would impose an undue burden on the constitutional rights of women" (435 F.3d at 1179). This holding is without merit.

At the threshold, an examination of the Dilatation and Evacuation abortion procedure ("D & E") is in order. See "Abortion[,] Some Medical Facts" (NRL Educational Trust Fund, Washington, D.C.) (1996), p. 13:

> *Dilatation and Evacuation (D & E)*
>
> Used to abort unborn children as old as 24 weeks, this method is similar to the D&C. The difference is that forceps with sharp metal jaws are used to grasp parts of the developing baby, which are then twisted and torn away. This continues until the child's entire body is removed from the womb. Because the baby's skull has often hardened to bone by this time, the skull must sometimes be compressed or crushed to facilitate removal. If not carefully removed, sharp edges of the bones may cause cervical laceration. Bleeding from the procedure may be profuse. (Footnote omitted.)

As shown above, there are three distinct elements of the offense which distinguishes partial-birth abortion, as defined in The Act, from non-intact D & E abortion. These are: (1) the *specific intent* of the physician to deliver vaginally an Unborn Child to a designated anatomical point(s) *outside* the mother's body *for the purpose of killing such Child at such point(s)*; (2) the *introduction of lethal force or means* to such Child *at such point(s)* by an overt act other than completion of such delivery which the physician *knows* will kill such Child; and (3) the actual

killing of such Child at such point(s). The "non-intact" D & E procedure does *not* contain these elements or features.

What the Court of Appeals failed to appreciate was that The Act requires the affected physician to have a certain specific intent, certain knowledge concerning the overt act which kills the Unborn Child and the introduction of lethal force or means to such Child at a designated anatomical point(s) outside the mother's body where the Child is killed. On the other hand, the non-intact D & E procedure, which contemplates dismemberment and death of such Child in the uterus through a dilated cervix, does not contain these elements or requirements. A physician performing a non-intact D & E would not run afoul of The Act if he were to remove from the mother's body an Unborn Child's skull for piercing, etc. *because* the introduction of lethal force or means would have occurred inside the mother's body and the Unborn Child would be dead or dying due to dismemberment at the time of such partial removal. Hence, the undue burden holding by the Court of Appeals, above, falls with its predicate.

The Court claims that the *scienter* provisions of The Act could not save it from such undue burden since "the actions described in the statute's definition of the prohibited procedure can be performed with the requisite intent in both the intact and the non-intact forms of the D & E procedure" (435 F.3d at 1180). The Court gave an example of how this might occur (*id.*).

The Court's position, together with its example, is speculative rather than realistic. Thus, a physician intending to perform a D & E abortion intends to and does introduce an instrument(s) through the woman's dilated cervix and commences to kill the Unborn Child by

dismemberment; he does not intend to deliver vaginally such Child partially outside the mother's body for the purpose of killing him or her there. Hence, The Act by intent and conduct does not reach non-intact D & C abortions.

As for the Court's example, The Act is neither implicated nor violated where the physician "performing a non-intact D & E" where the Unborn Child is in the breech position decides to "minimize the number of disarticulated fetal parts removed from the woman's body" and removes such Child vaginally to the specified point(s) in The Act, etc. *because* (1) the physician's intent was to do a D & E (dismemberment) procedure *in utero*, (2) such procedure was commenced and involved the introduction of lethal force or means *in utero*, (3) such procedure produces either a dead or dying Unborn Child prior to his or her partial removal from the mother's body and (4) the physician's intent in such partial removal was for the purpose of minimizing "the number of disarticulated fetal parts" and *not* for the purpose of killing the Unborn Child at such point(s) by an overt act other than completion of delivery which he or she knew would kill such Child. In other words, the *scienter* and conduct elements of the proscribed conduct show clearly that The Act could not and would not cover what the Court claims it does.

## III.

## THE HOLDING BY THE COURT OF APPEALS THAT THE ACT WAS FACIALLY UNCONSTITUTIONAL BECAUSE IT WAS IMPERMISSIBLY VAGUE IS ERRONEOUS

Finally, the Court of Appeals erred reversibly when it held The Act facially unconstitutional due to impermissible vagueness. As shown above, however, the definition of

the prohibited conduct is sufficiently precise and clear (1) to permit a person of ordinary intelligence to understand what is proscribed and (2) to prevent arbitrary or discriminatory law enforcement of The Act. See *Kolender v. Lawson, supra,* 461 U.S. at 357; *Grayned v. City of Rockford, supra,* 408 U.S. at 108-109.

The essence of the Court's position on vagueness is that The Act "fails to define clearly the medical procedures it prohibits, depriving doctors of fair notice and encouraging arbitrary enforcement", that its "scienter requirements do not cure the statute's vagueness" (435 F.3d at 1181). It said also that it might conclude that "the statute covers both forms of D & E, the language of the statute, taken as a whole, is not sufficiently clear what it permits and prohibits to guide the conduct of those affected by its terms, specifically medical practitioners" (*id.* at 1182-1183). This holding is without merit.

A fair reading of definition of partial-birth abortion in The Act shows clearly and precisely what is proscribed. It shows clearly that it does not cover non-intact D & E procedures.

In this regard, (1) in the D & E procedure the lethal force or means is introduced *into the mother's uterus* through a dilated cervix *whereas* in The Act the lethal force or means is introduced when the Unborn Child has been delivered vaginally to a designated anatomical point(s) *outside the mother's body*; (2) in the D & E procedure the physician's intent is to dismember (and kill) the Unborn Child *in utero whereas* in The Act the physician's intent is to deliver the Unborn Child vaginally to a designated anatomical point(s) outside the mother's body for the purpose of killing such Child at such point(s); and

(3) in the D & E procedure the Unborn Child either is killed *in utero* or is in the process of dying when pulled outside the mother's body *whereas* in The Act the Unborn Child is killed at a designated anatomical point(s) outside the mother's body by an overt act other than completion of delivery which the physician knows will kill such Child. In short, the *scienter,* conduct and place of killing are altogether different between The Act and the D & E procedure.

Such clarity and precision extend to a person of ordinary intelligence – and certainly to a medical practitioner – sufficient information as to what constitutes proscribed conduct and, by the same token, operate to prevent arbitrary or discriminatory law enforcement. See *Kolender v. Lawson, supra,* 461 U.S. at 357; *Grayned v. City of Rockford, supra,* 408 U.S. at 108-109. In addition, the *scienter* requirements operate to narrow the reach of The Act so that practitioners of D & E abortions need not fear that they are violating it.

## CONCLUSION

For the reasons and authorities set forth above, Life Advocates submits respectfully that the Court should (1) reverse the Judgment of the Court of Appeals and render judgment overruling *Roe v. Wade* and *Doe v. Bolton,* and, in the process, hold that an Unborn Child is a person under the 14th Amendment's Due Process Clause; or (2) if the relief in "(1)" is not granted, reverse the Judgment of the Court of Appeals and render judgment holding The Act constitutional; or (3) if the relief in "(2)" is not granted, reverse such Judgment and remand the cause to the Court

of Appeals with instructions that it apply the review standard described in *Turner*, above.

Respectfully submitted,

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